21-93.

SUPREME COURT OF THE UNITED STATES.

No. 215.

THE UNITED STATES, PLAINTIFFS IN ERROR,

vs.

HARMER DENNY.

IN ERROR TO THE CIRCUIT COURT, U. S., FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

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Gideon, print.

Among the rolls, records, and judicial proceedings of the circuit court of the United States, for the western district of Pennsylvania, may be found the following, viz:

No. 15, of November term, 1846.

The UNITED STATES OF AMERICA
vs.
HARMER DENNY, surety of Richard Biddle Butler, late paymaster and disbursing officer, &c.

Summons. Debt, sur-bond. Exit August 12th, 1846.

October 24th, 1846, summons returned; served by copy, August 19th, 1846.

Marshal, $2 50.

And afterwards, to wit, on the 30th day of March, 1847, the plaintiffs, by their counsel, John L. Dawson, esq., comes and files the following declaration:

Copy of declaration.

WESTERN DISTRICT OF PENNSYLVANIA, *sct.*

Harmer Denny was summoned to answer the United States of America of a plea, that he render unto the said United States the sum of twenty thousand dollars, which he owes to, and unjustly detains from, the said United States; and thereupon the said United States, by Andrew Wylie, jr., their attorney, complains:

For that, whereas the said defendant heretofore, to wit, on the fifth day of November, one thousand eight hundred and forty-two, at Pittsburgh, to wit, at the district aforesaid, by his certain writing obligatory, sealed with his seal, and now shown to the court, the date whereof is a certain day and year aforesaid, acknowledged himself to be held and firmly bound unto the said plaintiffs in the sum of twenty thousand dollars, above demanded. Yet the said defendant (although often requested so to do) hath not as yet paid the said sum of twenty thousand dollars above demanded, or any part thereof, to the said plaintiff, but hath hitherto wholly neglected and refused, and still doth neglect and refuse so to do, to the damage of the said plaintiff of twenty thousand dollars, and therefore it brings suit.

ANDREW WYLIE, Jr.,
Atty. for plaintiff.

And afterwards, to wit, on the 17th day of May, A. D. 1847, the defendant, Harmer Denny, by his attorney, M. Swartzwelder, esq., comes and files the following plea:

Copy of plea.

And the said Harmer Denny comes and defends, &c., when, &c., and prays oyer of the obligation in the plaintiffs' declaration mentioned, and of the condition thereof; which being read and heard, the said Harmer says actio non, because, he says, that the said Richard B. Butler did, at all times, so long as he continued in the service of the United States as paymaster and disbursing officer, well and truly discharge and account to the proper officers of the Treasury Department for all moneys which came into his hands, as such paymaster and disbursing officer, from and after the date of said obligation, to wit, the 5th day of November, 1842, and did well and truly do and perform all things appertaining to his said office, and did faithfully pay over all sums of money at any time remaining in his hands, when ordered by the proper officers of said Department; and this he is ready to verify. Wherefore, he prays judgment, &c.

M. SWARTZWELDER,
Defts. attorney.

And afterwards, to wit, on the 18th day of May, 1847, the plaintiffs, by their attorney, Andrew Wylie, esq., file the following replication:

Copy of replication.

And the said plaintiffs, as to the said plea of the said defendant, by him above pleaded to the said declaration, say, that they, the said plaintiffs, by reason of any thing by the said defendant in that plea alleged, ought not to be barred from having and maintaining their aforesaid action thereof against him, the said defendant, because, they say, that the said Richard Biddle Butler remained and continued in the service and employ of the said United States, as such paymaster, as in said condition of the said writing obligatory mentioned, for a long space of time, to wit, from the day and year aforesaid, until and upon the 27th day of May, A. D. 1846, and that during the said time that the said Richard Biddle Butler so remained and continued in the said service and employment of the said plaintiffs, as such paymaster as aforesaid, to wit, on the 31st day of March, 1846, and on divers other days and times between that day and the said 27th day of May, 1846, to wit, at the district aforesaid, the said Richard Biddle Butler, as such paymaster as aforesaid, had and received, for and on account of the said plaintiffs, divers sums of money, amounting, in the whole, to the large sum of five thousand eight hundred and ninety $\frac{2}{100}$ dollars, of lawful money of the United States; yet the said Richard Biddle Butler, although often requested so to do, hath not as yet accounted for or paid the same, or any part thereof, to the said plaintiffs, but hath hitherto wholly failed and made default, and the said sum of money so had and received by the said Richard Biddle Butler as aforesaid is still wholly unpaid and unsatisfied to the said plaintiffs, contrary to the form and effect of the said condition of the said writing obligatory, to wit, at the district afore-

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said; and this they, the said plaintiffs, are ready to verify. Wherefore they pray judgment, and their debt aforesaid, together with the damages by them sustained on occasion of the detention thereof, to be adjudged to them, &c.

1847, May 21st. Continued at the costs of plaintiff.

1847, October 13th. Deposition taken before Justice McLean, of the Supreme Court of the United States, filed; a copy of which is hereunto appended, (marked A.)

And afterwards, to wit, on the 20th day of October, 1847, the following rule issued:

Copy of rule.

In the circuit court of the United States, for the western district of Pennsylvania.

The UNITED STATES OF AMERICA
vs.
HARMER DENNY, surety of Richard B. Butler, late paymaster and disbursing officer, &c.

No. 14, of November term, 1846. Debt on bond.

And now, to wit, October 20th, 1847, rule on the part of the defendant to take the deposition of witnesses, to be read in evidence on the trial of the above cause, before Leonard L. Johns, [SEAL.] esq., at his office on St. Clair street, Pittsburgh, on Monday next, 25th instant, at 2 o'clock, p. m., on ten days' notice to the district attorney.

From the record.

H. SPROUL, *Clerk.*

Endorsed on the back:
October 20th, 1847. Service accepted.
ANDREW WYLIE, Jr.,
Attorney for plaintiffs.

Whereupon the deposition of Captain Edward Harding was taken, a copy of which is hereto appended, and (marked B.)

And afterwards, to wit, on the 25th day of October, A. D. 1847, the complainant, by the attorney, Andrew Wylie, esq., comes and files the following exceptions to the deposition taken before Justice McLean.

Copy of exceptions.

To the deposition of R. B. Butler, taken before the honorable John McLean, at Cincinnati, on behalf of said defendant, the said plaintiffs object:

First. That said deponent is not a competent person to testify in said case.

Second. That said deposition was taken without notice given to the opposite party, or their attorney, as required by law and the rules of court.

Third. That said deposition was irregularly taken in other respects.

ANDREW WYLIE, Jr.,
Attorney for plaintiffs.

October 27th, 1847.

And afterwards, to wit, on the 15th day of May, 1848, the defendant, by his attorney, W. Forward, comes and files the following rejoinder:

Copy of rejoinder.

And the said Harmer Denny says, that the plaintiffs, by any thing in their replication aforesaid, action non, &c.

Because he says, that though true it is that the said Richard B. Butler, during the said time that he remained in the employment of the United States as aforesaid, received said sum, $5890 $\frac{26}{100}$ *dollars*, in said replication mentioned, as the plaintiffs hath alleged, yet the defendant says, that the said Richard B. Butler, after he had received the said sum of money, to wit, on the 30th day of March, 1846, did lawfully pay and disburse to Spang & Co., for and on behalf of the United States, the said sum of $5890 $\frac{26}{100}$, for which he obtained a lawful receipt and acquittance, which was afterwards, to wit, on the day of April, 1846, delivered to Edward Harding, captain of ordnance, and then and there the commanding officer of the Allegany arsenal of the United States, near Pittsburgh. And the said defendant says, that the receipt aforesaid was a legal and proper voucher for the payment of $5890 $\frac{26}{100}$ by the said R. B. Butler, for and on behalf of the United States; and that he was lawfully entitled to a credit for the same in the settlement of his accounts as paymaster and disbursing officer aforesaid; and that the said defendant was and is entitled to require that the said credit of $5890 $\frac{26}{100}$ should be allowed in the settlement of the accounts of the said Richard B. Butler at the Department of War.

And the defendant further says, that if any loss has happened to the said plaintiffs by reason of the supposed default of the said Richard B. Butler, all such loss and injury has accrued through the errors, mistakes, and negligence of the officers of the United States to whom it appertains to settle and adjust the accounts of the said Richard B. Butler, for which loss or injury the said defendant is in no manner responsible; and that the said defendant is therefore acquitted and discharged of all liability under and by virtue of his obligation aforesaid.

And this he is ready to verify; wherefore he prays judgment, &c.

W. FORWARD.

And afterwards, to wit, on the 15th day of May, 1848, the plaintiffs,

by their counsel, Andrew Wylie, jr., esq., come and file the following sur-rejoinder:

Copy of sur-rejoinder.

And the said plaintiffs, as to the said rejoinder of the said defendant, say, that they ought not to be barred from having and maintaining their aforesaid actions thereof against the said defendant, by reason of anything by the said defendant in the said rejoinder alleged, because, they say, that the said Richard B. Butler hath not lawfully paid and disbursed, for and on behalf of the United States, the said sum of $5,890 26, or any part thereof, as is above alleged, by the said defendant; and this the said plaintiffs pray may be inquired of by the country.

ANDREW WYLIE, Jr.,
For plaintiffs.

And the deft. likewise. (Issue.)
W. FORWARD.

1847, November 18th, continued by plaintiffs.

And now, to wit, May 16th, 1848, the parties in the above cause being at issue, a jury being called, come, viz., Samuel H. Yate, James K. Kerr, James E. McFarland, Robert Orr, Dawson Wadsworth, Murray Wheland, James McCord, Richard Hughes, D. V. Derrickson, Samuel Hull, J. H. McElhany, and George Thompson, twelve good and lawful men, who having been duly summoned, returned, empannelled, and sworn to speak the truth, do say, that *that* they find for the defendant. Verdict rendered on the 18th May, 1848. 1848, May 24th. Judgment.

And afterwards, to wit, on the 13th day of March, 1849, the following bill of exceptions was filed by the plaintiffs' attorney:

Copy of bill of exceptions.

UNITED STATES
vs.
HARMER DENNY, surety of Richard B. Butler, late paymaster, &c.

In the circuit court of the United States, for the western district of Pennsylvania.

No. 15 of November term, 1846.

Be it remembered, that at May term, 1848, of said court, before the honorable Robert C. Grier, an associate justice of the Supreme Court of the United States, holding said court at Pittsburgh, the parties in this

cause were at issue on the plea of payment, as appears of record in the same, and a jury was called and regularly empannelled and sworn to try said issue, and on the trial thereof the plaintiffs gave in evidence a bond in the words following, to wit:

Know all men by these presents, that we, Richard B. Butler, of the city of Pittsburgh, and State of Pennsylvania, principal, and Harmer Denny and William Robinson, jr., of the city of Pittsburgh, and State of Pennsylvania, sureties, are held and firmly bound unto the United States of America, in the penal sum of twenty thousand dollars, lawful money, to be paid to the said United States, or to their certain attorney; for which payment, well and truly to be made and done, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the 5th day of November, one thousand eight hundred and forty-two.

Whereas the above bounden Richard B. Butler has been designated by the Secretary of War as paymaster and disbursing officer in the Ordnance department: Now, therefore, the condition of the above obligation is such, that if the said Richard B. Butler shall well and truly discharge and account to the proper officers of the Treasury Department, for all money which he may have, or which may hereafter come to his hands as such paymaster and disbursing officer, and shall well and truly do and perform, all things incumbent on him [in] pursuance of such designation, and appertaining to his said office, agreeably to the laws and regulations relating to the War and Treasury Departments, and shall faithfully pay over all sums of money at any time remaining in his hands, when ordered by the proper officers of said Departments, or either of them, this obligation to be null and void, otherwise to remain in full force and virture.

Signed, RICHARD B. BUTLER, [SEAL.]
Principal.

WILLIAM ROBINSON, JR. [SEAL.]
HARMER DENNY, [SEAL.]
Sureties.

And the said plaintiff further gave in evidence the account of Richard B. Butler, paymaster, &c., legally certified from the Treasury Department, and hereto annexed marked , shewing that the said Richard B. Butler, paymaster, was indebted to the plaintiffs in the sum of $5,890 26, on the 29th day of June, 1846, and rejecting a credit to that amount claimed by reason of a certain voucher hereafter described as the Spang voucher; the defendant on the contrary thereof, for the purpose of sustaining the issue on his part, gave evidence tending to prove that, on the 30th day of March, 1846, the said Richard B. Butler, paymaster, drew his check on the Merchants and Manufacturers' Bank of Pittsburgh, in favor of Spang & Co., for the sum aforesaid; that at that date, and up till the 2d day of April following, as by copy of bank account hereto annexed, there were funds to the credit of the

said Richard B. Butler in said bank sufficient to have paid the check had it been presented; that Spang & Co. were creditors of the plaintiffs to the amount of said check for iron furnished the United States arsenal at Pittsburgh; that said check was not presented for payment till the 14th day of April, 1846, when it was not paid, and protested for that reason. And that at the time when Spang & Co. received the check from the said Richard B. Butler, they gave him as paymaster a receipt in full for the amount, which receipt was produced, with the signature of the firm cut out.

Defendant gave evidence further to show that, at the time of the transaction, Butler stated that he did not wish the check to be presented for a few days, as it might embarrass the settlement of his account at the bank, which he was then making, and that Spang & Co. promised to hold it a few days for Butler's accommodation.

That E. Harding was, at that time, the officer in command of the Allegany arsenal, and had the control of Butler and all his official papers, and the supervision of his accounts.

That previous to the 14th of April, 1846, said Harding discovered that Butler had become a defaulter, and informed Spang & Co. thereof, who immediately presented the check, and payment being refused, had it protested on the 14th of April, 1846.

That said Harding, having taken possession of Butler's papers, suffered the receipt or voucher (copy annexed No. 21) which Spang & Co. had given to Butler for $\$5{,}890\frac{86}{100}$, to get into the hands of that firm, who having retained it for several days, cut their names off without his permission, and again returned it to Captain Harding, by whom it was forwarded as a voucher to the plaintiffs for so much money paid by Butler on plaintiffs' account to Spang & Co., and that this credit was disallowed by the accounting officers of the Government, and Butler charged with the amount.

Defendant further gave in evidence certain regulations of the Ordnance department requiring all purchases and contracts for supplies for the United States to be open purchases, or after advertising for proposals; also, that no receipt shall be taken in blank, or unless the money has been actually paid; that no due bills shall be given by paymasters for purchases on public account; and that there shall be no substitution of names, dates, &c., but the transaction shall be truly stated on the face of the voucher; also, that the voucher in question was in the usual form furnished by the Department.

And the plaintiffs, to rebut defendant's evidence, having given evidence tending to prove that Butler's check and Spang & Co's receipt were actually exchanged on the 13th day of April, 1846, and not on the 30th of March preceding; that on the said 13th of April there were no funds in bank to Butler's credit; that Spang & Co. had promised to hold the check over for a few days at Butler's solicitation, so as not to embarrass the adjustment of his bank account; also to show that the name of Spang & Co. was cut from the voucher by that firm with the knowledge and consent of Captain Harding; also, that Spang & Co.

did not at that time accept Butler's check as payment, or agree to look to him for their pay, plaintiffs gave no rebutting evidence.

And the evidence being closed on both sides, plaintiffs' counsel requested the court to charge the jury.

1st. That under the issue in this case, the burthen of proving payment lies upon, and must be clearly made out by, the defendant.

2d. If the jury believe that the check, dated 30th of March, 1846, was not delivered to Spang & Co. till the 13th of April following, and was protested regularly for non-payment on the day following, the voucher of the same date is a nullity; payment was not made, and the plaintiffs are entitled to recover.

3d. That if Spang & Co. did participate with Butler in an attempt to commit a fraud upon the Government, and for that reason would be estopped by their own receipt to deny payment, that can be no defence for the defendants in this action.

To which points the court answered as follows:

"The court charged as requested in the first point, and referred to the body of the charge for an answer to the others; declining to give the instructions as prayed for, and without the conditions and limitations in the charge heretofore delivered to the jury, which is as follows: 'The issue tendered by the sur-rejoinder in this case, and the only one you are sworn to try, is whether Richard B. Butler has lawfully paid and disbursed, for and on behalf of the United States, the sum of $5,890 $\frac{26}{100}$.

To support this issue the defendant has given in evidence what has been called voucher No. 21, or the Spang voucher. It consists of a bill of Spang & Co., against the United States, for iron furnished at the arsenal in this place. This amount was receipted by Spang & Co. as paid in a regular and formal voucher, and entered on the quarterly account of R. B. Butler in the arsenal.

It was dated March 30th, 1846, and was lodged with Capt. Harding, the superintendant of the arsenal, who was the proper officer of the Government to remit it, and whose duty it was to forward it with Butler's quarterly account to the Treasury.

Captain Harding afterwards put this voucher into the hands of Spang & Co., who returned it defaced or mutilated by cutting their names from it. The accounting officers afterwards refused to credit the account of Butler with this voucher, because it was so mutilated.

A receipt or voucher is prima facie evidence of money paid, but is not conclusive, as it may be shown to have been given by mistake or fraud. Butler having filed with the proper officer an authenticated and sufficient voucher and discharge for this sum, $5,890 $\frac{26}{100}$, that officer could have no right to mutilate or destroy such voucher, or to permit Spang to do it to the injury of Butler, or his sureties, unless it had been given by mistake or obtained by fraud. The sureties of Butler can claim no equity from his fraud, or from a mere mistake.

The question ought, therefore, to be viewed as if this voucher had never been mutilated. For if it was wrongfully mutilated by the im-

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proper conduct of Spang & Co., and permission of the Government officer in putting it into his possession, they should not be permitted in this way to charge the sureties.

If, on the contrary, it was obtained by the fraud and misrepresentation of Butler, so that he could not conscientiously hold it as against Spang & Co., the sureties could claim no benefit from it, even if it were at this moment intact and uncancelled.

The Government of the United States pays all her contracts and purchases in gold and silver. Their officers are not permitted to give due bills, nor is any person who deals with them bound to receive any thing but gold and silver coin; and the presumption is, that when such a voucher or receipt is given, the person who gave it had been so paid, as it was his own choice to receive any thing else. Yet, although the Government creditor is not bound to receive any thing but gold and silver, or to give a voucher without it, he may if he please accept any other equivalent. He may take bank notes; he may accept the note of the officer, or his check, as cash; and if he do so without any fraud or misrepresentations, his voucher will be binding on him, and a bar to any claim against the Government.

Nor would a Government officer, holding such a voucher, have a right to cancel it, or permit it to be cancelled, and charge the surety of the disbursing officer by a voluntary payment of the amount to the creditor, on the ground that he had not been paid in specie when he gave his acquittance.

It is in evidence in this case that Spang did not receive the money when he gave this voucher, but accepted the check of Butler on the Merchants and Manufacturers' Bank, both the voucher and check being antedated, so that the voucher might suit the quarterly account.

What was the true nature of this transaction? Spang was not bound to receive any thing but the money; and yet it is usual for Government officers to deposit the money in a bank, and to pay by a check on the bank, when the creditor may have specie or notes as he may desire.

If Butler gave this check to Spang, and it was received by him under the impression that there was money in bank to meet it, and that it would be paid on presentment, when, in truth, there were no funds to meet it, this would be a fraud on Spang. Butler could not, in conscience, use the voucher thus obtained, nor could his sureties claim any equity from the fraud of their principal; and, under such circumstances, the Government officers might justly return the voucher, and suffer it to be cancelled.

If, on the contrary, Spang was informed by Butler that there were no Government funds in the bank to meet the check; if, with a knowledge of the fact, through kindness to Butler, or from any other motive, he chose to accept Butler's due bill, check, or promise, instead of the money, he would have no right to cancel his voucher in the way he did, even though Butler's promise may not have been fulfilled, or his due bill or check honored. A breach of promise or failure to pay a note are not per se frauds.

The false date given to the voucher and check, if not done with any improper view, cannot affect the case. But if a man, for the purpose of deception, gives a false date to an instrument, he will afterwards be estopped from denying its truth, as against the parties intended to be deceived. If Spang, in concert with Butler, in order to give him a false credit with the Government and his sureties, gave this antedated voucher and took an antedated check, he should not afterwards be allowed to deny the truth of the date given to the transaction. If the date of the check was true, then Butler had sufficient funds in bank to meet it for several days after it was given; and if not, still, if Spang became a party with Butler, in giving a false appearance to the transaction, to save his credit with his sureties and the Government, he could not afterwards be permitted to cancel his voucher, when he discovered the evils of his scheme were likely to fall on himself.

These are all the instructions which the court think are material to the decision of the point in issue before you."

To which charge of the court the said plaintiffs, here in court and during the trial of said cause, except, and pray that this their bill of exceptions may be certified, signed, and sealed, that the same may become part and parcel of the record of said cause.

By the court allowed and ordered to be lodged on file.

R. C. GRIER, [SEAL.]
Circuit judge.

N. B. As this bill of exceptions has not been settled in presence of defendants' counsel, nor been submitted to their inspection before signing, I have signed, subject to all legal objections and amendments, on account of omissions or otherwise, which they may suggest, and may be found reasonable and just. R. C. GRIER.

To the foregoing bill of exceptions the counsel of the defendant objects.

Copy of objections.

I object to the within and foregoing bill of exceptions. It is defective and incorrect, and never has been submitted to the counsel of the defendant for examination. It was by accident that I first obtained any knowledge of the bill on the 6th day of the present month, (January 6, 1851.)

By the endorsement on the bill it appears not to have been filed until the 13th of March, 1849, ten months after the trial. The learned judge who tried the cause very properly notes that the bill had not been settled in presence of the defendant's counsel, and has therefore only signed it conditionally. This note by Judge Grier, it is presumed, was made on the 24th of February, 1849, because that is the date annexed to his note in the other case.

WM. WILKINS,
Attorney for defendant

January 17, 1851

A.

THE STATE OF OHIO, *city of Cincinnati.*

Personally appeared before the undersigned, a justice of the Supreme Court of the United States, Richard B. Butler, now at Cincinnati, a witness of lawful age, in behalf of the defendant, in a certain civil cause depending in the circuit court of the United States, for the western district of Pennsylvania, holden in the city of Pittsburgh, wherein the United States are plaintiffs, and William Robinson, jr., surety of Richard Biddle Butler, late paymaster and disbursing officer, &c., defendant; and also in a cause pending in the same court, and to be tried at the same place, wherein the United States are plaintiffs against Hamer Denny, surety of Richard Biddle Butler, late paymaster and disbursing officer, &c., defendant.

And the said witness, being by me first carefully examined, cautioned, and sworn to testify the whole truth, makes oath, deposeth, and saith, that he now resides in Cincinnati, more than one hundred miles from Pittsburgh, the place of trial. And he further states, that he acted as military storekeeper, paymaster, and disbursing agent for the government at the United States arsenal, near Pittsburgh, and while discharging those duties he made frequent and large purchases of iron for the Government from Spang & Co.; that it frequently happened that, in settling with the company for these purchases, he had no funds of the Government to make payment, and they being friendly to him, either took his word or check for payment, with the understanding that the check should not be presented until in funds, &c.

The deponent further says, that, in the spring of the year 1846, a bill of five thousand eight hundred and some odd dollars, approved by Captain Harding, and charged in the summary account of deponent, made up to the last day of March inclusive, was not paid on that day; but, to enable the deponent to make his vouchers correspond with his public account, Spang & Co. signed and delivered to this deponent the proper vouchers, agreeably to the forms of the Government, and took the deponent's check on the Merchants and Manufacturers' Bank for the amount, both antedated with the knowledge and consent of Mr. McCalla, one of the partners of the firm of Spang & Co.; and at the same time our understanding, and the promise of said McCalla, was, that the said check should be held over for the accommodation of this deponent, and that this deponent might, as he expected, be able to place funds in bank to meet it. And the said deponent further says, that the voucher so signed by Spang & Co. was put into the hands of Captain Harding, the commanding ordnance officer at the arsenal, to satisfy him, or as evidence that the bill of Spang & Co. had been paid.

The deponent further saith, that he considered the arrangement with the said McCalla, and his signing the voucher and taking this deponent's check, as closing this deponent's summary account and return; and this deponent was induced to adopt this expedient for that purpose,

because he was sanguine in the hope that he should be able to meet the said check so agreed to be held over.

R. B. BUTLER.

Sworn and subscribed before me, this 13th day of September, 1847.

JOHN McLEAN.

I do certify that, at the request of the defendants in the causes mentioned in the foregoing deposition, the fact applying to each and being the same, I caused the deponent therein, Richard B. Butler aforesaid, to come before me at the time and place above stated; and I further certify, that the reason of taking said deposition is, that the said witness resides more than one hundred miles from the city of Pittsburgh aforesaid, the place of the trial of said cause, depending as aforesaid in the circuit court of the United States, for the western district of Pennsylvania; and that no notification was given to said plaintiff, nor to any agent or attorney of the same, to be present at the taking of said deposition, and to put interrogatories, if he or they might think fit; because neither the said plaintiffs, nor any attorney or agent of said plaintiffs, reside within one hundred miles of the said city of Cincinnati, the place of taking said deposition.

I do further certify, that I am not of counsel or attorney to either of the parties in said deposition mentioned, nor interested in the event of said causes, or either of them.

That the deposition was reduced to writing by me, in presence of the said witness, and signed by him in my presence.

In testimony whereof, I have hereunto set my name and seal the 13th day of September, 1847.

JOHN McLEAN,
Justice Supreme Court, U. S. [SEAL.]

B.

UNITED STATES OF AMERICA
vs.
WILLIAM ROBINSON, jr., surety of Richard B. Butler, late paymaster and disbursing officer. } No. 14, of November term, 1846.

Deposition of witness, produced, sworn, and examined at the office of Leonard S. Johns, esq., one of the aldermen in and for the city of Pittsburgh, and ex officio an acting justice of the peace in and for Allegany county, State of Pennsylvania, which office is in said city, at No. 14, St. Clair street, on the 25th day of October, A. D. 1847, at 2 o'clock, p. m., of said day, in obedience to the rule of court hereto annexed, to be read on the trial of the above cause.

Edward Harding, of the city of Pittsburg, having been by me first duly sworn according to law, to testify the truth, the whole truth, and nothing but the truth, doth depose and say:

Deponent saith that he was captain of ordnance at the Allegany arsenal during all the time that Richard B Butler was paymaster and

disbursing officer there. Said Richard B. Butler was under the command of this deponent, and it was the duty of this deponent to see that his public accounts were right. The summary and quarterly accounts of the paymaster and disbursing officer were always submitted to this deponent, and by him transmitted to the Government. That on the first day of April it was the duty of the said Richard B. Butler to transmit, not only a summary, but a quarterly account. The summary statement must go on at the end of the month, but there are twenty days allowed to send on the quarterly account. In the month of April, 1846, this deponent had in his possession the duplicate vouchers of Spang & Co. of $5,890 26, dated Allegany arsenal, March 30th, 1846. The said voucher, No. 21, of Spang & Co., for materials was regularly receipted, and entered into the accounts of the Allegany arsenal as having been paid on the 30th of March, 1846. On the 14th of April following, the check of Richard B. Butler, covering the amount of Spang & Co's bill, was protested, which, I understood at the time from one of the firm, they were holding over at the request of Mr. Butler. Subsequently the friends of Mr. Butler evinced a desire to satisfy this account by other means, and for adjustment the voucher was placed in possession of Messrs. Spang & Co. It, however, was not satisfied, but returned to the arsenal, mutilated as represented by Mr. Butler in his remarks endorsed on the bill.

Mr. Spang was at the arsenal to see about this matter, and the vouchers were given to him with a request that they should be returned if the matter was not settled. The vouchers were to be returned in any event, whether he was satisfied or not. That voucher had been approved and signed by this deponent, and was in the printed and usual form prescribed by the Government. I called on Mr. McAuley, one of the firm of Spang & Co., and asked him if he had not the check; he said he had. I then asked why it had not been presented for payment. He told me Mr. Butler had requested him to withhold it for a few days. On my informing him it ought to have been presented before this, that Mr. Butler was a defaulter, and that if he did not present it he might lose the money; he expressed some reluctance at doing so, as Mr. Butler was his friend, but rather than lose the money he presented the check for payment, and it was not paid, and had it protested; all which was done according to my instructions and wish. It was our practice every quarter to make large purchases of iron from Spang & Co.

Sometimes Mr. Butler would go to make the purchases, and sometimes my clerk; all which received my sanction. When the summary statements are sent on at the end of the month, and exhibited the money as nearly exhausted, it was the practice of the Government to send on more funds. I do not know I had any control over the vouchers, unless there was something wrong in the figures, and then I had. If a voucher was not correct in form and substance, I would make him take it away and alter it. The commander has unlimited control over the person and papers of the officer.

I told Spang & Co., with regard to this voucher, that if it was satis-

fied to say so, and if not to do likewise; and they chose to write me a note, and took their names off. They had no authority to withdraw their names from the voucher, nor to cut their names off. I supposed they would draw a line over their names. I had no right to give them authority to withdraw their names. It was given up with a view to accommodate Spang & Co., and in the hope that the thing would be settled. I did not authorize them to draw a line across their names. About the middle of April, 1846, the sum of $1,354 88 was paid to me, being the balance struck by R. B. Butler in his quarterly return. I arrested R. B. Butler as a defaulter about the middle of April, 1846. (The duplicate voucher and the check referred to are in the hands of Judge Wilkins, by consent of parties, and to be read in evidence.)

Cross examined by Andrew Wylie, esq.

It must have been some time after the 30th of March that Mr. Spang came to see me. It must have been within two or three days after the check was protested. Mr. Spang told me he thought the friends of Mr. Butler would come forward and pay the check.

The taking of the voucher was more at my suggestion than his own. I think Mr. Spang came out to see about that business; they wanted to get their pay. I gave the voucher to Mr. Spang, and he was to return it whether he was paid or not. I presumed he would pass the pen through the name of Spang & Co., because I might have done so myself if similarly situated. I thought Spang & Co. entitled to their money; and if they did not get their money, the paper ought to be given up. I can't really say how long after I gave the voucher to Spang & Co. that they returned it with their names cut off. It might have been about forty-eight hours. When the paper was returned in that way, it was reported that all effort, on part of the friends of R. B. Butler, had failed to pay the claim of Spang & Co. I think the voucher was returned on the latter part of April.

(To the first two paragraphs on this page, brought out by cross examination of Andrew Wylie, esq., defendant's counsel takes exception as not proper evidence.)

It is agreed by the parties to this suit that this deposition shall be read in the case of the United States of America vs. Harmer Denny, surety of Richard B. Butler, late paymaster and disbursing officer.

E. HARDING.

CITY OF PITTSBURGH, *ss*.

I, Leonard S. Johns, an alderman in and for said city, do certify, that the foregoing witness, Edward Harding, was duly qualified [L. S.] and examined, at the time and place stated in the caption, in the presence of hon. William Wilkins and Walter Forward, counsel of defendant, and Andrew Wylie, esq., counsel of the plaintiff, at the time and place stated in the caption.

Witness my hand and seal the twenty-fifth day of October, A. D. 1847.

LEONARD S. JOHNS,
Alderman.

Copy of Docket entries.

No. 15, of November term, 1846.

THE UNITED STATES OF AMERICA
vs.
HARMER DENNY, surety of Richard Biddle Butler, late paymaster and disbursing officer, &c.
} Dawson, Forward & S. May 30, 1847.

Summons; debt; sur bond; exit 12th August, 1846.

Oct. 24th, 1846. Summons returned served by copy, August 19th, 1846. Marshal, 2 50.

1847, March 30th. Narr. filed.
" May 17th. Plea of defendant filed.
" Do. 18th. Replication filed.
" Do. 21st. Cause continued at the cost of the plaintiff.
" Oct. 13th. Depositions taken before Justice McLean, opened by Judge Irwin, and filed, and notice left at Mr. Wylie's office.
" Oct. 20th. Rule, on the part of defendant, to take the deposition of witnesses before Leonard S. Johns, on three days' notice, (copy.)
" Oct. 25th. Exceptions to deposition taken before Justice McLean filed.
" Oct. 28th. Subpœna, on the part of plaintiffs, to J. McDonald, Glenn, and Long.
" Nov. 18th. Continued by plaintiff.
1848, May 10th. Subpœnas to James McAuley, Spang, and Butler on part of plaintiff.
" Do. 12th. Subpœnas to John B. Guthrie and Richard B. Butler on part of defendants.
" Do. 13th. Subpœna to Wm. Robinson, jr., on the part of defendant.
" Do. 15th. Rejoinder filed.
" Do. 15th. Sur-rejoinder filed.

And now, to wit, May 16th, 1848, the parties in the above cause being at issue, a jury being called, come, viz., Samuel H. Tate, James K. Kerr, James E. McFarland, Robert Orr, Dawson Wadworths, Murray Whelan, James McCord, Richard Hughes, D. V. Derrickson, Samuel Hull, J. H. McElheny, and George Thompson, twelve good and lawful men, who, having been duly summoned, returned, empannelled, and sworn, do say, that *the* find for the defendant. Verdict rendered the 18th May, 1848.

May 24th, 1848, judgment upon verdict.

1849, March 13th, bill of exception filed.

1851, January 4th, writ of error to the Supreme Court U. States issued; same day citation issued, and delivered to the marshal.

UNITED STATES OF AMERICA,
Western district of Pennsylvania, sct.

I, Henry Sproul, clerk of the circuit court of the United States for the western district of Pennsylvania, do hereby certify, that the foregoing is a true and correct copy of the record and proceedings in the case of the United States vs. Harmer Denny, surety of Richard Biddle Butler, late paymaster and disbursing officer, &c., No. 15, of November term, 1846.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at Pittsburgh, this 21st day of January, [L. S.] one thousand eight hundred and fifty-one, and of the independence of the United States the seventy-fifth.

H. SPROUL, *Clerk*.

UNITED STATES OF AMERICA, *sct.*

The President of the United States, to the judges of the circuit [L. S.] court of the United States, for the western district of Pennsylvania.

Because in the record and proceedings, as also in the rendition of the judgment of a plea, which is in the said court before you, between the United States of America, plaintiffs, and Harmer Denny, defendant, a manifest error hath happened, to the great damage of the said United States of America, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court of the United States, to be then and there held. That the record and proceedings aforesaid being inspected, the said Supreme Court may correct that error, and do what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Roger B. Taney, esquire, chief justice of the Supreme Court of the United States, at Pittsburgh, this 4th day of January, A. D. 1851, and of the independence of the United States the seventy-fifth. H. SPROUL, *Clerk*.

I, Thomas Irwin, one of the judges of the circuit court of the United States for the western district of Pennsylvania, do hereby allow the above writ of error.

Witness my hand and seal, this 4th day of January, A. [SEAL.] D. 1851. TH. IRWIN.

UNITED STATES OF AMERICA,
Western district of Pennsylvania, sct.

The President of the United States, to the marshal of the western district of Pennsylvania, greeting:

Whereas the United States of America have this day sued out a writ of error to a certain judgment in a certain action of debt, recovered against them on the 24th day of May, A. D. 1848, in the circuit court of the United States, for the western district of Pennsylvania, in the third circuit aforesaid, by Hamar Denny, defendant, returnable in the Supreme Court of the United States on the first Monday of December next:

These are therefore to command you, that you make known to the said Harmar Denny that he be and appear to the said writ of error, in the said Supreme Court of the United States, on the first day of the next term thereof, to hear an assignment of errors thereof, and herein fail not at your peril.

And how you shall have executed this writ of citation, and make return to our clerk of our said court for the western district of Pennsylvania, at Pittsburgh, on the rule day of our said court for the month of February next.

Witness the honorable Thomas Irwin, esq., judge of the United States for the western district of Pennsylvania, at Pittsburgh, this 4th day of January, A. D. 1851, and of the independence of the United States the seventy-fifth.

TH. IRWIN. [SEAL.]

Endorsed January 11th, 1851. Served personally by copy.
LEONARD S. JOHNS,
Dep. marshal.

UNITED STATES,
Western district of Pennsylvania, sct.

I, Henry Sproul, clerk of the circuit court of the United States for the Western district of Pennsylvania, do hereby certify, that the foregoing is a true copy of the citation and return made thereon, in the case of the United States vs. Harmar Denny, surety of Richard Biddle Butler, late paymaster and disbursing officer, &c.

In testimony whereof I have hereunto set my hand, and affixed the seal of the said court at Pittsburgh, the 22d day of January, A. D. 1851, and the independence of the United States the seventy-fifth.

H. SPROUL, *Clerk.*